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September 25, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147
Comments of Transwire Communications, Inc.

Dear Ms. Roman Salas:

Pursuant to section 1.419(b) of the Commission's rules, transmitted herewith, on behalf of Transwire Communications, Inc., are an original and four (4) copies of its comments in the above-referenced proceeding. Also enclosed is a copy of these comments on diskette formatted in WordPerfect 5.1 for Windows.

In addition, enclosed is a confirmation copy of this filing marked "Stamp In." Please date stamp this copy and return it to the courier delivering this package.

Should any question arise concerning this filing, please contact the undersigned attorney directly.

Sincerely,

Randall B. Lowe
Counsel for Transwire Communications, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	**CC Docket No. 98-147**
Advanced Telecommunications Capability	)	

COMMENTS OF TRANSWIRE COMMUNICATIONS, INC.

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Dated: September 25, 1998

SUMMARY OF THE ARGUMENT

Transwire Communications, Inc. ("Transwire") is an advanced telecommunications services company whose mission it is to build, operate and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Northern Telecom's Consumer Digital Modem ("CDM") technology. In Transwire's opinion, the goals of Section 706 of the 1996 Act can best be achieved by developing a truly competitive market place and a regulatory environment that is conducive to technological innovation, capitalization and market investment in advanced telecommunications capability and services. The Commission has already taken appropriate steps to implement the pro-competitive goals of the 1996 Act; namely, by subjecting incumbent LECs to the interconnection and unbundled access obligations of the 1996 Act with respect to both their circuit-switched and packet-switched networks, by determining that it will not forbear from applying the requirements of sections 251(c) and 271 with respect to advanced services, and by denying requests to create a single, global LATA for packet-switched services. While these measures will greatly enhance the timely deployment of advanced telecommunications capability and services, Transwire believes the Commission must still go further to facilitate rapid deployment, foster fair competition, and encourage technological advancement.

In particular, the Commission should require that incumbent LECs only offer advanced telecommunications services through a separate subsidiary and on a resale basis to competitors. In order to address anticompetitive concerns, the Commission should also require that the separate subsidiary be subject to heightened regulations, including restricting the subsidiary's access to funding from its incumbent LEC parent.

Furthermore, to enable competitive LECs to achieve their full potential in deploying advanced communications capability, the Commission should fully implement detailed rules to require incumbent LECs to provide nondiscriminatory collocation, collocation of cost-efficient integrated equipment, and the timely ordering and provisioning of collocation space. The Commission should also guarantee the preservation and protection of the existing copper wire infrastructure and ensure unbundled access to the incumbent LECs' copper loop to encourage the full realization of emerging copper-based technologies. Without such access and plant protection, Transwire and other companies seeking to deploy CDM, xDSL and other technologies to enhance the quality and variety of telecommunications services available to the public, will be locked out of the marketplace.

In addition to these safeguards, Transwire strongly recommends that the Commission adopt a national policy to assure access to the local loop at any technically feasible point and nondiscriminatory access to OSS systems for loop ordering and provisioning. The Commission must also make certain that incumbent LECs are required to offer for resale the advanced services they generally offer to non telecommunications carriers, and should not, under any circumstances, modify LATA restrictions currently imposed on BOCs.

Transwire applauds the efforts of the Commission to promote competition in local markets and to eliminate existing barriers to the deployment of advanced telecommunications capability and services. However, without the full implementation of the foregoing safeguards, Transwire and other potential competitive providers of advanced telecommunications capability and services, will be handicapped by the monopoly access network practices of incumbent LECs, and ultimately ineffectual in their efforts to offer ubiquitous, lower-cost advanced capability and services in the immediate future.

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COMMENTS OF TRANSWIRE COMMUNICATIONS, INC.

Transwire Communications, Inc. ("Transwire"), by and through its attorneys, hereby submits its comments on the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding concerning the deployment of wireline services offering advanced telecommunications capability.[1]

I. INTRODUCTION

The Commission's *NPRM* and companion Memorandum Opinion and Order ("*Order*") were issued in response to six Petitions filed, pursuant to Section 706 of the Telecommunications

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[1] *See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et. al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket Nos. 98-147, *et al.*, FCC 98-188 (released August 7, 1998) ("*NPRM*").

Act of 1996 (the "1996 Act"),[2] which concern various regulatory issues pertaining to the provisioning of advanced telecommunications capability. In its *NPRM*, the Commission proposes measures to promote the deployment of wireline services offering advanced telecommunications capability. Specifically, in the *NPRM*, the Commission (i) proposes an optional alternative pathway for incumbent local exchange carriers ("incumbent LECs") that would allow separate affiliates to provide advanced services free from incumbent LEC regulation; (ii) proposes rules intended to ensure that all entities seeking to offer advanced services have adequate access to local loops and collocation arrangements; (iii) seeks comment on ways to modify the section 251(c) unbundling requirements once companies are in compliance with the rule changes; and (iv) seeks comment on measures that would provide BOCs with targeted interLATA relief to ensure that all consumers, even those in rural areas, are able to reap the benefits of advanced telecommunications capability.

In sum, through the instant proceeding, the Commission takes steps to implement the pro-competitive goals of the 1996 Act with respect to advanced services and "to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."[3] Indeed, in the *NPRM* and *Order*, the Commission cites the 1996 Act as providing the blueprint

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[2] *See* Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, codified at 47 U.S.C. § 157 note (1996). The 1996 Act is codified at 47 U.S.C. §§ 151 *et seq.*

[3] *See NPRM* at ¶¶ 1-2.

for promoting the speedy deployment of new telecommunications technologies, including advanced services.[4]

A. Summary of Transwire's Operations

Transwire is keenly concerned with ensuring the timely deployment of advanced telecommunications capability through a competitively-neutral marketplace, particularly with regard to guaranteeing adequate access to copper loops and collocation arrangements. Like other competitors in the advanced telecommunications services industry, Transwire was formed in response to the 1996 Act to provide telecommunications services to meet the exploding demand for bandwidth. Transwire is an advanced telecommunications services company whose mission is to build, operate and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Northern Telecom's ("Nortel") Consumer Digital Modem ("CDM") technology. CDM technology is a high-speed asynchronous digital offering that provides a secure, "always up" connection of 1 Mbps "downstream" to the end user and 320 kbps "upstream" from the end user over the existing copper wire telephone infrastructure. These speeds are roughly eight times faster than prevailing dual-channel Integrated Service Digital Network ("ISDN") products and seventeen times faster than the popular 56 kbps modems being used today.

With the CDM technology, Transwire utilizes the existing copper wire telephone infrastructure to provide customers with both local and long-distance telephone services and reliable high-speed access to the Internet, corporate "intranets" and Transwire's own "extranet."

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[4] *See id.* at ¶ 1.

Customers can use this copper wire connection for simultaneous telephone and fax communications while still connected to the Internet, an intranet, or Transwire's extranet. The combination of dependable telephone services and high-speed data communications will allow Transwire to provide its customers a portfolio of faster, more effective, comprehensive and dependable network communications environments than currently available in the telephone/data services market.

Transwire believes that the quick-to-market CDM technology represents an immediate, cost-effective solution for bridging the "last mile" of transmission from the fiber network points-of-presence or "POPs" to the customer's premises, where most data communications networks presently bog down. CDM fills the gap between current limited speed analog modems and very high-speed, but higher cost and more difficult to implement, digital subscriber line technologies ("xDSL") (See Exhibit A).

In addition to its efficiency and reduced cost to the consumer, CDM technology offers truly ubiquitous service. CDM is designed to operate over existing non-loaded loops without specialized engineering, loop extensions or remote access vehicles. In essence, CDM technology transforms the existing copper plant into high-speed, data-over-voice loops and thus enables Transwire to offer 100 percent ubiquitous service while at the same time protecting the copper plant. In addition, as discussed below in more detail, because CDM technology can transmit signals using two-wire analog loops, the technology is no more intrusive than ISDN with regard to interference. If provided with the appropriate loops, Transwire can offer technology at a cost not markedly different than the cost of providing ISDN services.

B. Summary of Transwire's Position

As an initial matter, Transwire supports the Commission's findings in the *Order*, which clarified the Commission's views on the applicability of existing statutory requirements in sections 251 and 271 of the 1996 Act.[5] Specifically, Transwire agrees that (i) incumbent local exchange carriers ("incumbent LECs") are subject to the interconnection obligations of section 251(a) and (c)(2) of the Act with respect to both their circuit-switched and packet-switched networks;[6] (ii) incumbent LECs are subject to the unbundled access obligations set forth in section 251(c)(3), and the facilities and equipment used by incumbent LECs to provide advanced telecommunications services are network elements;[7] and (iii) the Commission was correct in denying the petitions of several of the regional Bell operating companies[8] to the extent such petitions requested the Commission to forbear from applying the requirements of sections 251(c) and/or 271 with respect to the provision of advanced services.[9]

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[5] *See id.* at ¶ 32.

[6] *See id.* at ¶ 11.

[7] *See id.*

[8] *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed January 26, 1998); *Petition of US West Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26 (filed February 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability*; CC Docket No. 98-32 (filed March 5, 1998); *Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91 (filed June 9, 1998).

[9] *See id.* at ¶ 12.

Transwire also believes that the bulk of the Commission's proposed policies set forth in its *NPRM*, including policies addressing access to collocation and loops, and unbundling and resale obligations, will promote continued technological innovation and deployment of advanced telecommunications capability by companies such as Transwire. In fact, the success of Transwire and the ability to use CDM technology hinges on access to the existing copper wire telephone infrastructure. As discussed more fully herein, without such access, provisioned on a fair, reasonable and non-discriminatory basis, Transwire and other companies seeking to deploy this breakthrough technology to enhance the quality and variety of telecommunications services and products available to the public will be locked out of the marketplace.

In order to address certain anti-competitive practices in the current marketplace, Transwire believes that the Commission should require incumbent LECs to offer advanced telecommunications services through a separate affiliate and require that affiliate to offer its services to requesting carriers for resale at wholesale rates. Moreover, Transwire contends that the Commission should also impose certain limitations on the advanced services affiliate, including restricting the affiliate's access to funding from the incumbent LEC's parent. Furthermore, to enable competitive LECs to achieve their full potential in deploying advanced telecommunications capability, the Commission should fully implement detailed rules ensuring access to the collocation arrangements and copper loops necessary for competitors to provide advanced services.

In sum, the deployment of advanced telecommunications capability, at efficiencies capable of supporting widespread consumer acceptance of advanced services, is the wave of the future. In these Comments, Transwire demonstrates that in order to encourage the near-term deployment of advanced telecommunications capability, the Commission must fully implement

the interconnection, collocation, unbundling and resale requirements set forth in the 1996 Act. Heeding its unequivocal statutory mandate, the Commission should undertake only those actions that foster fair competition and technological advancement.

II. PROVISION OF ADVANCED SERVICES THROUGH A SEPARATE AFFILIATE

A. Background

In the *NPRM*, the Commission proposes an "optional alternative pathway" that would allow incumbent LECs to provide advanced services through (i) separate affiliates free from incumbent LEC regulation, or (ii) on an "integrated basis," and therefore subject to the requirements of section 251(c).[10] Under the Commission's proposal, an affiliate that is truly separate from the incumbent LEC would not be deemed an incumbent LEC and, therefore, would not be subject to the incumbent LEC regime established by Congress in section 251(c).

It is unknown at this time what incumbent LECs will do when faced with the "business decision"[11] of offering advanced telecommunications services directly or through a separate affiliate. It is likely, however, that certain incumbent LECs will elect to continue to provide advanced services themselves rather than establish a separate affiliate. Transwire submits that allowing the incumbent LECs to continue to offer advanced services will in no way curb the

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[10] *Id.* at ¶¶ 19, 37.

[11] *Id.* at ¶ 86 ("[s]imply put, each incumbent LEC *See*king to provide advanced services must make a business decision as to whether it wishes to provide such services free of section 251(c) requirements").

abuses inherent in the current system where the requisite network resides solely with one competitor -- the incumbent LEC.

Transwire therefore recommends that the Commission adopt a policy such that an incumbent LEC may offer advanced telecommunications services only through a truly separate subsidiary. For purposes of preserving the provisioning of advanced services on a resale basis, The Commission should rely on its plenary statutory authority to require the advanced services subsidiary to offer its services for resale to requesting carriers at wholesale rates. Moreover, given that an incumbent LEC's advanced services affiliate will inherit certain competitive advantages by virtue of its relationship with the incumbent LEC, Transwire recommends that advanced services affiliates be subject to a higher level of regulation than other competitive local exchange carriers ("competitive LECs") during the period of transition to a competitive marketplace.

1. Allowing incumbent LECs to offer advanced telecommunications services on an integrated basis does nothing to deter the anti-competitive practices of the incumbent LECs.

The *NPRM* seems to presuppose that, if given the choice, incumbent LECs will elect to offer advanced services through a separate affiliate. Transwire suggests that this supposition is, at best, less than certain. Given that incumbent LECs have been successful under the current regulatory regime at locking out competition by locking in the network and collocation arrangements necessary to provide advanced services, incumbent LECs may choose to continue to provide advanced telecommunications services on an integrated basis. Allowing incumbent LECs to continue to offer advanced services directly will in no way curb the anti-competitive practices which impede competition in the advanced services market.

The current marketplace is rife with examples of the anticompetitive practices of incumbent LECs. Competitors complain, for example, that they cannot get DSL-compatible loops from incumbent LECs on reasonable terms and on a timely basis,[12] and that incumbent LECs routinely respond with "no space" assertions to requests for physical collocation.[13] Competitors also allege that incumbent LECs often refuse to interconnect their local data networks with those of competitors.[14] Last, but certainly not least, evidence abounds that incumbent LECs frequently ignore the Commission's directive to provide nondiscriminatory access to their operations support systems ("OSS").[15]

Indeed, the Motions for Reconsideration of the *Order* filed by certain Bell operating companies ("BOCs") make clear their intention to continue to wage the war to impede access to their networks by competitors.[16] Transwire believes that a properly implemented separate

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[12] *See, e.g., Reply Comments of DSL Access Telecommunications Alliance*, CC Docket Nos. 98-11, 98-26, 98-32, at 11 (filed May 6, 1998); *Comments of Covad Communications Co.*, CC Docket Nos. 98-11, 98-26, 98-32, at 8-9 (filed April 6, 1998) ("*Covad Comments*"); *Comments of AT&T Corp.*, Docket Nos. 98-11 at 16-19; 98-26 at 7-9; and 98-32 at 10-11 (filed April 6, 1998).

[13] *See, e.g., Covad Comments* at 13-15 ("Covad has generally found that in as many as 15-20% of the central offices it *See*ks to collocate in – even and especially among residential offices in which Covad would be the *first* collocator – incumbent LECs claim that no space is available for physical collocation.")

[14] *See Petition of the Association for Local Telecommunications Services for a Declaratory Ruling*, CC Docket No. 98-78 (filed May 27, 1998) ("*ALTS Petition*") at 12-14. Transwire also contends that certain incumbent LECs are bundling their services with a selected ISP, in an effort to shut out competition.

[15] *See, e.g., ALTS Petition* at 22-24.

[16] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification, CC Docket No. 98-147 (filed September 8, 1998); *In the Matter of Deployment of*

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affiliate construct, attendant with the non-discrimination requirement, will assist in alleviating this problem. That is, an incumbent LEC has an incentive to open its network to its advanced services affiliate to the extent necessary to allow its affiliate to offer advanced services. Under the separate affiliate model proposed by the Commission--where incumbent LECs are required to treat all competitive LECs the same, including the incumbent LECs advanced services affiliate[17]--other competitors, at least in theory, would be entitled to the same access to the incumbent LECs' network as the advanced services affiliate. In contrast, under the current regulatory regime, incumbent LECs have no incentive to open their networks to anyone and therefore have resisted doing so.[18]

Although a separate affiliate model may not be the perfect fix to the problem -- and certainly will be difficult to enforce -- Transwire believes that it is the preferable means by which

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Wireline Services Offering Advanced Telecommunications Capability, Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, CC Docket No. 98-147 (filed September 8, 1998).

[17] A central tenet of the Commission's proposal is that, to be free of incumbent LEC regulation, an advanced services affiliate must function just like any other competitive LEC and not derive unfair advantages from the incumbent LEC. *See NPRM* at ¶ 96.

[18] The Commission must be certain, however, that its separate affiliate construct in no way impedes the deployment of technologies that are efficiently designed to be integrated into the existing public switched telephone network ("PSTN") switching infrastructure. The CDM technology utilized by Transwire is such an integrated technology. With regard to any separation of switching facilities and operations, the Commission must ensure that the incumbent LEC and its advanced services affiliate are able to deploy high-speed data line equipment on the LEC's switch. Given that these integrated technologies use the existing infrastructure already in place in the copper loop plant, they allow for more cost-effective deployment. As such, the Commission must ensure that its separate affiliate proposal does not in any way impede the deployment of integrated technologies.

to promote fair competition for advanced telecommunications services.[19] Left to their own devices, the incumbent LECs are likely to engage in the same types of behavior which led us to where we are today--competitors and would-be competitors struggling to gain access to the facilities necessary to compete in the advanced telecommunications services market. For these reasons, Transwire recommends that the Commission mandate that incumbent LECs be permitted to provide advanced services only through a separate affiliate.

2. The Commission should require incumbent LECs' advanced services affiliates to offer their advanced telecommunications services which they offer to competitors for resale at wholesale rates.

It is critical that the Commission not only encourage the deployment of facilities necessary to provide advanced telecommunications, but also promote the offering of advanced services on a resale basis. To this end, Transwire posits that it is necessary for the Commission to extend the incumbent LECs' obligation under section 251(c)(4) to their advanced services affiliates. That is, the Commission must preserve the ability of competitive LECs under section 251(c)(4) to purchase from incumbent LECs (or their affiliates) advanced telecommunications services for resale at wholesale rates.

Section 251(c)(4) obligates incumbent LECs to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not

[19] Transwire also notes for the record two other options--requiring total incumbent LEC divestiture of advanced telecommunications assets and services or prohibiting incumbent LECs from offering advanced telecommunications service.

telecommunications carriers.[20] Under the Commission's separate affiliate proposal, the advanced services affiliate, rather than the incumbent LEC, would provide advanced services at retail to end users. To foreclose the possibility of a claim that this construct does not accommodate the requirement that incumbent LECs offer their advanced telecommunications services for resale at wholesale rates,[21] Transwire urges the Commission to affirmatively extend the obligations of section 251(c)(4) to the incumbent LECs' advanced services affiliates.

Transwire submits that the Commission has statutory authority to require the incumbent LECs' advanced services affiliates to offer advanced services for resale at wholesale rates. Sections 4(i),[22] 201(b),[23] and 303 (r)[24] of the 1996 Act authorize the Commission to adopt any

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[20] Section 251(c)(4) provides, in pertinent part, that "each incumbent local exchange carrier has the following duties: . . .

> (4) RESALE. – The duty – (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service."

47 U.S.C. § 251(c)(4) (1996). The Commission has ruled that advanced telecommunications services, to the extent they are local exchange services, are subject to the incumbent LECs' obligations under section 251(c). *NPRM* at ¶¶ 35-64.

[21] For instance, an incumbent LEC may claim that because it will be offering advanced services at retail through its separate affiliate, which will be treated as a competitive LEC and therefore not subject to the obligations of section 251(c)(4), it is under no obligation to offer advanced services for resale to requesting carriers at wholesale rates.

[22] Section 4(i) of the Act provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154 (i) (1996).

[23] Section 201(b) of the Act provides, in pertinent part, that the "Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b) (1996).

rules it deems necessary or appropriate in order to carry out its responsibilities under the Act.[25] Moreover, courts have routinely held that the Commission's general rulemaking authority is "expansive" rather than limited,[26] and that the Commission has the authority to adopt rules to administer congressionally mandated requirements.[27]

Requiring incumbent LECs' advanced services affiliate to offer their advanced telecommunications services for resale at wholesale rates is not inconsistent with the Act, which expressly requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and to take action "to

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[24] Section 303(r) of the Act grants the Commission, *inter alia*, the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .." 47 U.S.C. § 303(r) (1996).

[25] *See also In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, at ¶ 23 (released December 24, 1996) ("*Non-Accounting Safeguards Order*"), *Order on Reconsideration*,12 FCC Rcd. 2297 (1997), *recon. ending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir.) (filed March 31, 1997), Second Order on Reconsideration, 12 FCC Rcd. 8653 (1997), *aff'd sub nom., Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Second Report and Order, 12 FCC Rcd. 15756 (1997). *See also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956) (stating that the Commission has the unquestioned and broad authority to modify its rules to serve the "public interest" as long as such modifications "are reconcilable with the Communications Act as a whole").

[26] *See Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (". . . the Act gave the Commission not niggardly but expansive powers"); *FCC v. Nat'l Citizens Comm. For Broadcasting*, 436 U.S. 775, 796 (1978) (". . . so long as the regulations are not an unreasonable means . . . to achieve [a statutory goal], they fall within the general rulemaking authority . . .").

[27] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (administrative decisions, unless arbitrary or capricious, should be given deference if "based on a permissible construction of the statute"); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an

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accelerate deployment of such capability by . . . promoting competition in the telecommunications market."[28] Moreover, it is clearly in the public interest to encourage the wide-spread provisioning of advanced telecommunications services through resale. In sum, an incumbent LEC which provides advanced telecommunications services through a separate affiliate should not be released of its obligation under section 251(c)(4) to provide advanced services for resale at wholesale rates.[29]

The importance of resale in cultivating the wide-spread availability of advanced services should not be minimized. The growth of the resale industry in the long distance market is illustrative. Industry data reflects that resale is the fastest growing segment of the long distance market.[30] In 1996, revenues from wholesale minutes were $7.2 billion, making resellers one of

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administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

[28] *See* 47 U.S.C. § 157 note (1996).

[29] In this regard, Transwire disputes the Commission's tentative finding in the *NPRM* that imposing the obligations of section 251(c) of the Act upon the advanced services affiliate is contrary to the Act, insofar as such obligations only apply to incumbent LECs. *NPRM* at ¶ 94. Transwire posits that the Commission's proposal to allow incumbent LECs to offer advanced telecommunications services through a separate affiliate, coupled with its position that the obligations of section 251(c) apply only to incumbent LECs, as defined in the Act, may undermine one of the principal tenets of the Act--the ability of competitive LECs under section 251(c)(4) of the Act to purchase advanced telecommunications services for resale at wholesale rates.

[30] *See* http://www.tra.org/telecom_resale/history.html (citing a report by ATLANTIC-ACM, a Boston-based consulting firm, which reflects an estimated compound annual growth rate of 14.9 percent from 1993-1998).

the largest purchasers of long distance services from major, facilities-based carriers.[31] The reason is simple: resale allows quick entry and provides carriers with the ability to offer services where they do not have facilities, thus providing the benefits of competition to a greater constituency. In the process, resale exerts downward pressure on rates, bringing them more in line with the underlying costs of service.

In sum, the purchase of advanced telecommunications services for resale solely at retail rates[32] undercuts the pro-competitive requirements of the Act and could serve to impede the availability of advanced telecommunications services. The Commission must therefore preserve the right of competitive LECs to purchase advanced telecommunications services for resale at wholesale rates.

B. Advanced Services Affiliates

1. Given the inherently unique relationship between incumbent LECs and their advanced services affiliates, a higher level of regulation is necessary and justified.

Although Transwire advocates the mandatory creation of a separate subsidiary for the provision of advanced services by incumbent LECs', Transwire believes that the Commission must be mindful that there remain anticompetitive concerns associated with the operation of an

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[31] *See* http://www.tra.org/telecom_resale/facts_figures.html (citing a report by ATLANTIC-ACM, a Boston-based consulting firm).

[32] *See* 47 U.S.C. § 251 (b)(1) (1996) ("OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS – Each local exchange carrier has the following duties: (1) RESALE. – The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."). The Commission states that the affiliate would remain subject to the

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advanced services affiliate. Given the inherently unique relationship between the incumbent LEC and its separate affiliate, the Commission must be vigilant in ensuring that its rules foster an environment in which an incumbent LEC's affiliate is truly separate and distinct from the incumbent LEC.

In the *NPRM*, the Commission sets forth certain structural separation and nondiscrimination requirements with which the incumbent LEC would need to comply in order to establish an advanced services affiliate that would not be deemed an incumbent LEC. Although Transwire supports the principles underlying each structural separation and nondiscrimination requirement, Transwire submits that the Commission's proposals are inadequate to maintain independence between the incumbent LEC and its "separate" affiliate. In order to enforce the structural separation and nondiscrimination obligations against the incumbent LECs, Transwire strongly contends that a level of regulation for the advanced affiliates higher than that for other competitive LECs is justified and necessary during the period of transition to a competitive market.

An incumbent LEC's advanced services affiliate will inherit certain advantages by virtue of its relationship with the incumbent LEC: namely, an established and recognized brand name, operational linkages with its wholesale provider (the incumbent LEC), and an incumbent corporate parent that owns the local network and numerous related enterprises that the advanced services affiliate is likely to employ in developing bundled service offerings to its end user customers. These advantages represent a significant asset that other competitors lack and set the

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general duties of telecommunications carriers in section 251(a) and the obligations of all local exchange

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advanced telecommunications affiliate apart from, and in a more favored position than, its competitors. For these reasons, Transwire believes it is unlikely that the Commission can attain its goal of placing an incumbent LEC's affiliate on the same footing with other competitive LECs.

2. The Commission should prohibit virtual collocation by the affiliate.

Virtual collocation arrangements provide one example of the inherent advantage of an incumbent LECs' advanced services affiliate and the consequent need for increased regulation vis-à-vis other entrants. There are currently no standards for DSL technology. As a result, there are numerous "flavors" of DSL technology, which technologies may or may not be compatible with the incumbent LECs' technology. Compatibility is critical in a virtual collocation arrangement, whereby competitors use the incumbent LECs' end office (or comparable) facilities to provide service. Virtual collocation therefore will benefit only the incumbent LECs' affiliate, whose technology would be invariably compatible with that of the incumbent LEC. As a result of this disparity, Transwire recommends that the Commission prohibit an incumbent LEC's advanced services affiliate from virtually collocating in the incumbent LEC's facilities at least until such time as DSL standards are developed and generally deployed.[33]

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carriers in section 251(b). *NPRM* at ¶ 92 (citing 47 U.S.C. § 251(a) and (b) (1996)).

[33] Moreover, as is discussed more fully in Section III *infra*, in Transwire's view, the lack of technological standards associated with provisioning advanced services renders the concept of virtual collocation for advanced services meaningless. Indeed, this emphasizes the need for absolute access to physical collocation arrangements for advanced telecommunications services.

3. Incumbent LECs should be prohibited from financing the operations of their advanced services affiliates.

A critical question left unanswered by the Commission's "structural separation" proposal is the manner in which the separate affiliate will be funded. Allowing the incumbent LEC to finance the operations of its advanced telecommunications affiliate would certainly provide the advanced services affiliate a leg up on the competition. It was incumbent on "start-up" companies like Transwire to raise the capital and secure the financing necessary to offer advanced telecommunications services on a competitive basis. Therefore, it would be unfair to allow an incumbent LEC's advanced services affiliate access to the vast financial resources of the incumbent LEC. The Commission should therefore prohibit the incumbent LEC from funding the operations of its advanced services affiliate.[34]

4. The Commission should consider the size of the incumbent LEC in implementing its separate affiliate proposal.

Transwire posits that smaller incumbent LECs, such as rural telephone companies or carriers serving a minimal number of the nation's subscriber lines should not be subject to the same separations requirements as the BOCs. Transwire believes that this position is in accordance with the Commission's prior rulings pertaining to the regulation of smaller

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[34] In addition, the advanced services affiliates of incumbent LECs have a strong incentive to favor the incumbent LECs' information services providers to the exclusion of competing providers (thereby raising the possibility of a price squeeze on unaffiliated information service providers). The Commission should therefore impose certain obligations on the advanced services affiliate and the incumbent LECs' information services provider such that competing information service providers are treated in a nondiscriminatory manner.

incumbent LECs.[35] Transwire is committed to serving the rural areas of the country through the deployment of its technology. Transwire hopes that unnecessary regulatory burdens will not impede the provisioning of advanced services technology, such as CDM technology, in rural areas.

5. The Commission should prohibit transfers of facilities from an incumbent LEC to an advanced services affiliate.

An advanced services affiliate that is a successor or assign of the incumbent LEC is subject to the requirements of section 251(c).[36] The Commission therefore seeks comment on how particular transactions between incumbents and their advanced services affiliates should affect the regulatory status of the affiliates.[37] As a general principle, Transwire recommends that only truly *de minimis* transfers -- those which fail to provide the advanced services affiliate with a competitive edge over other competitors -- should be permitted. However, because this is generally a fact-based determination[38] and will be concomitantly difficult to enforce, Transwire

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[35] *See, e.g.*, In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services Implementation of 601(d) of the Telecommunications Act of 1996, WT Docket No. 96-162, Report and Order, FCC 97-352, at ¶ 4 (released October 3, 1997) (exempting rural telephone companies from the requirement of providing commercial mobile radio services through a separate affiliate). *See also* section 251(f) of the Act, which provides exemptions from the obligations of Section 251(c) for certain rural telephone companies and allows a local exchange carrier with fewer than two percent of the nation's subscriber lines to petition a state Commission for suspension or modification of application of a particular requirement. 47 U.S.C. § 251(f) (1996).

[36] 47 U.S.C. §251(h) (1996).

[37] *See NPRM* at ¶¶ 104-15.

[38] *See, e.g., Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 n.9 (1974).

recommends that the Commission prohibit all transfers of facilities from an incumbent LEC to its advanced services affiliate.

In the *NPRM*, the Commission tentatively concludes that any transfer of local loops from an incumbent LEC to an advanced services affiliate would make that affiliate an assign of the incumbent LEC, and therefore not subject to regulatory status as a competitive LEC.[39] Inasmuch as the incumbent LECs' local loops are the "lifeline" of advanced telecommunications services, Transwire vigorously supports this conclusion.[40] To promote fair competition in the advanced telecommunications market, the Commission must ensure that the network remains separate and apart from the advanced services affiliate.

The Commission also tentatively concluded that, subject to a "*de minimis* exception," a wholesale transfer of facilities used to provide advanced services, including, but not limited to DSLAMs and packet switches, would make an affiliate the assign of the incumbent LEC.[41] The Commission, however, proposes to adopt a *de minimis* exception for the transfer of such facilities.[42]

While Transwire generally supports, in theory, the adoption of a *de minimis* standard for the transfer of facilities to an advanced services affiliate, Transwire believes that the reality of

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[39] *See NPRM* at ¶ 107.

[40] Transwire also agrees with the Commission's tentative conclusion that if an incumbent sells or conveys central offices or other real estate in which equipment used to provide telecommunications services is located to an advanced services affiliate, that would make the affiliate an assign of the incumbent.

[41] *NPRM* at ¶106.

implementing the proposal may render it unworkable. For example, given their professed intent to offer xDSL technologies in the near future, it is highly probable that the incumbent LECs have already made significant investment in DSLAMs, packet switches, and the like.[43] While it is clear that a wholesale transfer of these facilities would not be a permitted transfer, Transwire believes it would be difficult to ascertain with any precision what level of transfer should be deemed *de minimis*. From Transwire's standpoint, any transfer to the advanced services affiliate would provide the affiliate with a competitive advantage over other competitors which were required to pay for the equipment necessary to provide service.

In the event that the Commission decides to allow transfers between the incumbent LEC and its affiliate, subject to the *de minimis* exception, Transwire recommends the following:

- Transfer restrictions should apply regardless of whether the facilities are installed or when the facilities were ordered.
- Incumbent LECs should be required to provide detailed documentation of any transfer of facilities, inclusive of the value of the facilities transferred.
- Audit requirements, similar to those set forth in section 272(c) of the 1996 Act, should apply to the advanced services affiliate. Transwire suggests that the audit be conducted within the six month period following the creation of an affiliate, to allow for an analysis of any initial transfer to the advanced services affiliate.
- In the event of a transfer to an affiliate, to the extent there are space limitations on the incumbent LEC's premises, either in the central office or remote terminal, an affiliate may not leave the equipment in its current location.

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[42] *Id.* at ¶108.

[43] *See Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 at Attachment 2, pp. 12-13 (filed January 26, 1998) (referring to Bell Atlantic Press Release, *Bell Atlantic to Offer ADSL-Based Service Starting in Mid-1998*, May 19, 1998).

- The principles underlying transfers of facilities should apply with equal force to transfers of an incumbent LECs' non-facilities assets (such as customer accounts, employees, and brand names).

- The Commission must make clear that the network disclosure requirements in section 251(c)(5) apply to the transfer of incumbent LECs facilities to the advanced services affiliate.[44]

III. MEASURES TO PROMOTE COMPETITION IN THE LOCAL MARKET

A. Collocation Requirement

Pursuant to section 251(c)(6) of the Communications Act, incumbent LECs are required to offer, "on rates, terms and conditions that are just, reasonable, and nondiscriminatory," physical or virtual collocation to carriers desiring to locate interstate special access and switched transport facilities at LEC premises.[45] Sections 51.321 and 51.323 of the Commission's rules, implement these collocation requirements.[46] In particular, section 51.321 requires incumbent LECs to provide "any technically feasible method of obtaining interconnection or access to unbundled network elements" on request by a telecommunications carrier.[47] While the rules also require incumbent LECs to prove to state commissions that the requested method of obtaining interconnection or access to unbundled network elements ("UNEs") is not technically feasible in

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[44] Because section 251(c)(5) does not expressly contemplate an affiliate transaction between an incumbent LEC and its advanced services affiliate, Transwire believes that the Commission should clarify that the statutory language requiring the incumbent LECs to provide notice "of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks" encompasses the need to notify competitive providers of a transfer of the incumbent LECs' facilities to its advanced services affiliate.

[45] 47 U.S.C. § 251(c) (6) (1996).

[46] 47 C.F.R. §§ 51.321 and 51.323 (1998).

order to deny a request, several parties, including ALTS and the United States Department of Commerce, National Telecommunications and Information Administration ("NTIA"), contend that further requirements are needed. Transwire supports their contentions.

1. The Commission should adopt a "rebuttable presumption" approach with respect to technical feasibility.

ALTS argues that although incumbent LECs offer physical collocation, competitive entry into the data services market is impeded by restrictions on the type of equipment that can be placed in collocation spaces, delays in providing space, and excessive rates and onerous terms and conditions for collocation.[48] NTIA, voicing similar concerns with such costs and delays, suggests that the Commission adopt a rebuttable presumption approach to "technical feasibility."[49] Specifically, NTIA recommends that in those instances where a state commission has ordered an incumbent LEC to offer a particular collocation arrangement, or where an incumbent LEC has voluntarily offered such an arrangement, it should be presumed "technically feasible" for incumbent LECs in any other part of the country to offer that same arrangement.[50] Transwire shares the concerns of ALTS and NTIA and urges the Commission to adopt NTIA's

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[47] 47 C.F.R. § 51.321 (1998).

[48] *See ALTS Petition* at i, 21.

[49] Letter from Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket Nos. 98-91, 98-32, 98-26, 98-11, at 15 (filed July 17, 1998) ("*NTIA Comments*").

[50] *Id.*

rebuttable presumption approach as a means to address the incumbent LECs' ability to delay and restrict the collocation needs of competitive carriers.

2. The Commission should adopt specific and detailed national rules for collocation to prevent incumbent LECs from engaging in discriminatory and anticompetitive practices.

The Commission has adopted minimum requirements for nondiscriminatory collocation addressing, *inter alia*, space allocation and exhaustion, types of equipment to be collocated and available LEC premises for collocation.[51] In Transwire's view, the Commission has concluded correctly that specific rules outlining minimum requirements for nondiscriminatory collocation arrangements will implement the pro-competitive provisions of the 1996 Act and remove barriers to entry.[52] The Commission also has concluded that state commissions may adopt additional collocation requirements consistent with the 1996 Act and the Commission's rules. Given the states' key role in problem solving and implementing policies to facilitate efficient and effective competition in an evolving marketplace, such regulatory flexibility is fundamental. However, as discussed below, the Commission's minimum requirements do not go far enough. Rather, the Commission must adopt specific and detailed national rules for collocation to prevent incumbent LECs from engaging in discriminatory and anticompetitive practices.

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[51] *See NPRM* at ¶ 122.

[52] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15783, ¶ 558, (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom.*, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) (Nos. 97-826 *et al.*).

Transwire agrees with the Commission's tentative conclusion that while minimum standards are useful, national standards are necessary to ensure removal of barriers to entry and speed deployment of advanced services. In particular, Transwire advocates revisions to the Commission's rules to include, among other things:

- Cageless collocation;
- Cage sharing;
- Cross connection to cages of other collocated carriers; and
- Elimination of equipment limitations.

In Transwire's opinion, competitive carriers should be able to pursue any form of interconnection, including copper termination at the MDF, and integrated solutions whereby the line card is integrated directly into the switch. It is important to ensure that competitive LECs are provided with a number of collocation options and not restricted to any particular collocation arrangement. In short, any just, reasonable and nondiscriminatory means of interconnection and access to UNEs must be allowed in order to assure competitive carriers such as Transwire guaranteed access to the packet network through copper connection in order to provide advanced services. Furthermore, to the extent that states have adopted (or may adopt in the future) collocation requirements that go beyond the minimum requirements established by the Commission, the Commission should encourage such regulatory latitude. However, it is critical that state commissions, in certifying advanced service providers on an intrastate basis, create regulatory conditions that, *at a minimum*, meet the Commission's proposed national standards.

3. The Commission's rules must be revised in a technically neutral manner to remove restrictions on collocating equipment with switching functionality.

Currently, Commission rules and policies only require incumbent LECs to provide interconnection for facilities and equipment for "the transmission and routing of telephone exchange service and exchange access" as well as access to UNEs "for the provision of a telecommunications service."[53] Indeed, section 51.323(c) of the Commission's rules exempts incumbent LECs from offering "collocation of switching equipment or equipment used to provide enhanced services."[54] Nevertheless, in its *Local Competition Order*, the Commission specifically reserved the right to reexamine this limitation at a later date in furtherance of the pro-competitive goals of the 1996 Act.[55]

As several petitioners have demonstrated, this limitation now threatens the development and use of more efficient, integrated telecommunications equipment--equipment that typically performs multiple functions and broadens the scope of potential service offerings.[56] A restriction on the type of equipment competing carriers may collocate will certainly arrest the growth of efficient network design and undoubtedly encourage incumbent LECs to delay the entry of competitive carriers to the advanced services market. Recognizing these concerns, the Commission has tentatively concluded that it will require incumbent LECs to allow competitive

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[53] 47 U.S.C. §§ 251(c)(2)(A) and (3) (1996); *See also Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581.

[54] 47 C.F.R. § 51.323(c) (1998).

[55] *See Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581.

[56] *See, e.g., NTIA Comments* at 15; *Covad Comments* at 16-17.

LECs to collocate equipment to the same extent the incumbents allow their advanced services affiliate to do so.[57] In Transwire's opinion, such a requirement does not directly address the limitations imposed by section 51.323(c).[58] Transwire instead proposes that any collocation equipment rule address the certainty that restrictions on placing switching equipment in collocation spaces will prevent new entrants from taking advantage of more cost efficient integrated equipment and delay competitive entry. In this regard, Bellcore studies identify a 60 percent annual operations cost savings for an integrated line card approach such as that used in CDM technology. (See Exhibit B).

Notably, because the incumbent LEC can integrate the switch and xDSL line cards, competitive LECs are at a great competitive disadvantage if collocation rules exclude the possibility of integrated technologies. Accordingly, Transwire urges the Commission to adopt a national standard to allow carriers, whether new entrants or advanced service affiliates, to collocate equipment that includes switching functionality.

With regard to whether the Commission should differentiate among technologies by, for example, extending collocation only to packet-switching or circuit-switching equipment or to equipment that performs both switching and other functions, as discussed above, Transwire advocates collocation requirements that are technologically neutral. As the Commission has stated, it is often difficult to differentiate between switching and multiplexing equipment as

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[57] *See NPRM* at ¶ 129.

[58] 47 C.F.R. § 51.323©

functions are often blurred.[59] Accordingly, as the limitations imposed by section 51.323(c) are clearly inconsistent with the use of efficient integrated technology and the pro-competitive goals of the Act, the Commission should revise its rules to reflect the economic efficiency of using integrated equipment for the provision of advanced services.

4. The Commission should adopt rules which facilitate the provisioning of collocation space to competitive LECs in a timely manner and guard against the incumbent LECs' ability to routinely claim "lack of space."

The Commission has acknowledged several commenters' concerns regarding limited or non-existent collocation space.[60] Transwire agrees with these commenters that a solution to the allocation of space issue must address not only alternatives to physical collocation cages, but also safeguards to prevent incumbent LECs from imposing unnecessary costs and delays on competitive carriers for space and construction of collocation cages. As NTIA has indicated, even assuming the availability of collocation space, it is typically the competitive carrier that bears the cost of constructing collocation cages--a process that "can take several months and can entail one-time capital costs in the range of $30,000-100,000."[61]

In response to such concerns, the Commission has tentatively concluded that it should require incumbent LECs to offer alternative collocation arrangements to incumbent LEC

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[59] *See Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581.

[60] *See NPRM* at ¶ 136.

[61] *NTIA Comments* at 10. NTIA also discloses that "the absence of collocation space for competitors in an incumbent LEC office does not necessarily prevent the incumbent LEC from installing its own DSL equipment in that office." *Id.* n.25 (citations omitted).

affiliates and new entrants in the advanced services market.[62] Such arrangements would include shared collocation, collocation cages of any size, and cageless collocation.[63] Transwire strongly supports the Commission's efforts to formulate alternative collocation arrangements and urges the Commission to adopt its proposed requirements. In addition, the Commission should require incumbent LECs to remove obsolete equipment and non-critical offices in central offices to increase the amount of space available for collocation.[64]

In the context of alternative collocation arrangements, the Commission requests that parties identify safeguards or other measures to resolve the issues of security and access to incumbent LECs' networks. While security is certainly a consideration and of concern to both incumbent LECs as well as competitive carriers, Transwire urges the Commission not to allow incumbent LECs to use these concerns as a means to prevent, delay, or otherwise impede competition. For example, in Transwire's opinion, requiring escorts for competitive LEC technicians would only delay the servicing of equipment and consequently the deployment of advanced services to the customer. A more reasonable and efficient safeguard might be requiring competitive LEC technicians to maintain security clearances. Concealed security cameras or badges with computerized tracking systems can provide additional security measures.

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[62] *See NPRM* at ¶ 37.

[63] *See id.* at ¶ 137.

[64] Transwire submits that the importance of access to physical collocation arrangements is underscored by the fact that virtual collocation of advanced telecommunications services such as ADSL is essentially meaningless due to the lack of standards associated with such technology. *See* supra at II.B.2.

However, in the interest of consistency and efficiency, the Commission should require that security measures be adopted by way of a national standard for all central offices rather than permitting varying standards by central office.

Regarding what measures may be available to reduce the cost of physical collocation arrangements, Transwire generally supports the idea of allotting only the "percentage of use" cost of conditioning the collocation space to the competing provider, regardless of whether the remaining space is vacant, and allowing smaller competing providers to pay on an installment basis.[65] Requiring one party to pay all up-front space preparation charges is both unreasonable and unnecessary and may deter new entrants to the advanced services market. Alternatively, adopting the "percentage of use" cost basis and small business installment plan as a national standard would encourage new entrants and assist competitive carriers in further reducing costs. Such a national standard would simplify the implementation and enforcement of the requirements of sections 251 and 271 of the Act.

Finally, the Commission must address the entry barrier posed by delays between the ordering and provisioning of collocation space. The Commission has correctly determined that regulations to shorten collocation ordering intervals must be implemented.[66] In most, if not all instances, incumbent LECs are cognizant of space availability and pricing. Therefore, requests for such information should be forthcoming within twenty-four hours from the time the request is made. The space should then be provided within a reasonable time thereafter. In any event, the

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[65] *See NPRM* at ¶ 143.

[66] *See id.* at ¶ 144.

Commission should set specific intervals by which time the incumbent LEC can be expected to provide collocation information and space.

With regard to what should be done in the event an incumbent LEC fails to meet a specified deadline, Transwire believes the burden should rest on the incumbent LEC to demonstrate why the specified time frame is unreasonable. When such a demonstration cannot be made, or when requests for information are not timely honored, the Commission should address competitive LECs' complaints consistent with the Commission's *Report and Order* establishing procedures to be followed when formal complaints are filed against common carriers.[67]

In its *Rocket Docket*, the Commission adopted procedures necessary for the review and resolution of complaints against common carriers within certain statutory deadlines set forth in the 1996 Act. As the Commission acknowledged in that proceeding, "[p]rompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets."[68] Similarly, the Commission's goal of promoting "innovation and investment . . . to stimulate competition for all services, including advanced services"[69] can only be met with the implementation of formal complaint rules. In order to achieve the Commission's stated objectives, competitive carriers must be given a forum

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[67] *See In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497(released November 25, 1997) ("*Rocket Docket*").

[68] *Rocket Docket*, 12 FCC Rcd at 22499, ¶ 1.

[69] *NPRM* at ¶ 1.

for prompt resolution of their complaints concerning collocation arrangements and the ordering and provisioning of collocation space. A swift and effective framework for complaint resolution should likewise extend to the Commission's proposed local loop and resale requirements.

B. Local Loop Requirements

Transwire supports the Commission's determination that requires incumbent LECs to provide xDSL-compatible loops to requesting carriers.[70] However, as a provider of advanced services via CDM technology, Transwire shares the Commission's concern that such service providers may not have adequate access to the "last mile" for the provision of their various service offerings. Recognizing the critical need for competitive carriers to have access to the copper infrastructure for the provision of advanced services, the Commission has identified the local loop as "a network element that incumbent LECs must unbundle 'at any technically feasible point'" and has "defined the local loop to include 'two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.'"[71] In addition, the Commission has concluded that when specified, incumbent LECs must provide carriers with loops that are free of loading coils, bridged taps, and other electronic impedances.[72] As discussed more fully below, Transwire supports the Commission's proposals and urges the swift adoption of these measures to ensure the viability of technologies such as CDM and xDSL for the provision of advanced services.

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[70] *See id.* at ¶ 151.

[71] *Id.* at ¶ 152 (citing *Local Competition Order*, 11 FCC Rcd at 15689-91, ¶¶ 377-79).

1. The Commission must adopt national standards to ensure access to the local loops at any technically feasible point and to preserve the existing copper infrastructure.

In Transwire's opinion, the issue of access to the local loop is critical if the rapid deployment of advanced telecommunications capability and services is to be achieved. In particular, in order for Transwire to provide its customers with local and long-distance telephone services and reliable high-speed access to the Internet, corporate "intranets" and other value-added services using its CDM technology, it must have unencumbered access to the existing copper wire telephone infrastructure. Specifically, CDM technology, unlike dial-up modems, take advantage of frequency spectrum above the voice band. Since CDM technology uses frequency spectrum above the voice band, the loops to which the modems are connected must be free of devices that will choke the higher frequencies. While the technology is designed to work on virtually any non-loaded cable pair, the insertion of devices such as loading coils or isolation coils adversely impacts the higher frequency and interferes with the capability.

The Commission must therefore ensure that the existing copper wire infrastructure, a vital resource for the provision of advanced services through the use of CDM and other copper-based technologies, is preserved and protected. In this regard, incumbent LECs should not be permitted to take any actions that result in rendering the copper useless.

Moreover, the Commission should ensure that to the extent that incumbent LECs disenfranchise copper facilities, for example, through the deployment of fiber throughout their network, requesting carriers should have the right, if technically feasible, to obtain access in a

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[72] *See id.*

timely manner to the disenfranchised copper. Competitors seeking access to the disenfranchised copper should not be required to engage in lengthy negotiations to obtain such access.

In short, the need to establish national standards with respect to the regulation of local loops goes beyond facilitating entry into the advanced services market or encouraging its rapid deployment. Rather, adopting national standards to require incumbent LECs to preserve the copper infrastructure as a resource and to simplify access to disenfranchised copper facilities is critical to the very feasibility of deploying advanced telecommunications capability to all Americans.[73]

2. The Commission must assure nondiscriminatory access to OSS systems for loop ordering and provisioning.

In response to the Commission's request for comments concerning its OSS rules, Transwire maintains that current OSS rules are inadequate to ensure that competitive LECs have access to necessary detailed information regarding loops. As the Commission has correctly assessed, competitors must have sufficient data to enable them to determine whether loops are compatible with their particular technology and capable of supporting the installation of technology specific equipment.[74]

Currently, competitive carriers generally have no information regarding outside plant and equipment while incumbent LECs have such information at their disposal. Incumbent LECs also typically have electronic databases to which competitive LECs are not privy. Such unequal

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[73] *Local Competition Order*, 11 FCC Rcd at 15692, ¶ 382.

[74] *See NPRM* at ¶ 157.

access, the Commission rightly has determined, represents "significant potential barriers to entry."[75] Accordingly, Transwire urges the Commission to require that, as loop information becomes available, incumbent LECs should immediately share such information with new entrants. In particular, incumbent LECs should be required to give competitive carriers a Design Layout Report ("DLR") for each unbundled network element in the pre-ordering process, detailing how their system is routed. The DLR will enable competitive LECs to make an independent determination, *prior to ordering and implementation*, whether the system layout is acceptable or not. In this manner, competitive LECs will, for instance, be able to determine whether a given loop is capable of supporting their service. Such absolute access to OSS is critical to ensuring competition in the advanced telecommunications services market and the widespread provisioning of advanced telecommunications services to end users.

3. To address those technologies which may result in interference, the Commission should adopt national standards on spectrum management.

In the context of loop spectrum management, the Commission seeks guidance concerning how to address potential interference resulting from the provision of advanced telecommunications capability by way of varied signal formats on copper pairs in the same bundle.[76] In this regard, the Commission must be mindful that all technologies are not created equal. In Transwire's experience, the use of existing unencumbered copper wire for the provision of advanced capability and services using CDM technology will not cause any

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[75] *Local Competition Order*, 11 FCC Rcd at 15763, ¶ 516.

[76] *See NPRM* at ¶ 159.

interference with other services. Specifically, CDM technology is "loop friendly" with existing and future services in that it is spectrally compatible with the T1.413 PSD (Power Spectral Density) mask. Because the technology is designed to a tighter mask than ADSL and other xDSL services, it does not interfere with itself or other DSL services. Furthermore, because CDM technology is "loop friendly," it requires only the unbundled local loop and does not require any special loop conditioning. Traditional xDSL technology, on the other hand, may cause interference problems.

Interference standards are therefore necessary to regulate those technologies that do cause interference. Nevertheless, as none currently exist, Transwire supports the adoption of national standards on spectrum management to address actual loop modulation. To date, standards typically have been a function of a particular manufacturer's specifications. Nevertheless, the Commission should impose standards to specify what can and cannot go over loops, while recognizing that there is no single answer to spectrum management.

The burden should be on the incumbent LECs to prove that a particular technology causes interference. Transwire proposes a test similar to that proposed by the Commission with respect to sub-loop unbundling and collocation at remote terminals: incumbent LECs must permit a technology over its loops unless it can demonstrate that such technology causes interference. This standard will encourage technological innovation and speed the deployment of advanced services.

4. The Commission should adopt uniform standards for attachment of electronic equipment at the central office end of a loop.

Transwire strongly supports the Commission's tentative determination that uniform national standards for attachment of electronic equipment at the central office end of a loop

should be implemented and applicable to both new entrants and incumbent LECs. Allowing incumbent LECs to continue to set their own requirements for central office equipment will only enable delays, increase costs, and assure inconsistency and disorder. Accordingly, the certification process should be taken out of the hands of incumbent LECs and instead be regulated by a set of national standards.

5. The Commission's interpretation of a loop must be sufficiently broad to encompass unencumbered loops as well as "conditioned loops."

The Commission seeks comment on the definition of "loop" to ensure that competitive LECs have access to the loop functionalities they need to offer advanced services.[77] Because different technologies can provide advanced services over loops of different specifications, the Commission should ensure access to any loop that is sufficient to support a given technology, subject to interference constraints.[78] Interference constraints, rather than the incumbent LECs, should be the sole determinant of what services can be offered over copper loops. Requesting carriers should be allowed to purchase the lowest cost functional loop available for a given technology.

Moreover, the Commission must ensure access to "raw" copper loops at the cost applicable to such loops. For example, CDM technology works well over unconditioned loops – that is, loops that are not "qualified" or "conditioned" to meet more stringent requirements. The deployment of CDM technology should not be impeded by requiring excess conditioning and

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[77] *See NPRM* at ¶164.

qualification of loops. Transwire submits that its position will result in lower costs, more rapid deployment, and ultimately a wider availability of advanced telecommunications services.

6. The Commission must ensure that the requirements it adopts pertaining to sub-loop unbundling and collocation at remote terminals are enforced even-handedly.

The Commission tentatively concludes that incumbent LECs must provide sub-loop unbundling and permit competitive LECs to collocate at remote terminals, unless the incumbent LEC can demonstrate: (i) sub-loop unbundling is not "technically feasible" or (ii) there is insufficient space at the remote terminal to accommodate the requesting carrier.[79] As the Commission correctly points out, the use of sub-loop elements and access to the remote terminal may be the only means by which competitive LECs can provide advanced services for those end-users whose connection to the central office is currently provided via digital loop carrier ("DLC") systems.[80] Transwire therefore supports the Commission's tentative conclusion requiring incumbent LECs to provide sub-loop unbundling and collocation at remote terminals.

The Commission should be sensitive, however, to the ability of the incumbent LECs to raise frivolous arguments to circumvent their obligations to provide sub-loop unbundling and collocation at remote terminals in the same manner that they have raised claims with respect to unbundling network elements and collocation at end offices. Accordingly, the Commission

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[78] In Transwire's view, such a definition should include the following elements: DC continuity, no load coils, POTS supportive, and the restriction of interferors in the same binder group.

[79] *Id.* at ¶174.

[80] *See id.*

should be wary of unfounded claims of technical infeasibility and insufficient space associated with requests for sub-loop unbundling and collocation at remote terminals. For these reasons, Transwire recommends that the Commission extend the competitive safeguards applicable to physical collocation and access to unbundled elements, as discussed *supra*,[81] to the incumbent LECs' provisioning of sub-loop unbundling and collocation at remote terminals.

In general, the Commission should adopt a "rebuttable presumption" of technical feasibility and require the incumbent LECs to affirmatively demonstrate to requesting carriers a lack of space at the remote terminal. In addition, an incumbent LEC should not be able to reserve collocation space at the remote terminal for their own use or their advanced services affiliates to the exclusion of other requesting carriers. Moreover, given the critical nature of collocation at remote terminals to the provision of advanced services, if sub-loop unbundling proves technically infeasible or there is insufficient space at the remote terminal, the incumbent LEC should be obligated to provide an alternative unbundling method at no greater cost to the competitive LEC.

Given that each competitive LEC has its own business strategy and unique reasons for obtaining loop access in a particular manner or at a particular location, a competitive LEC must be able to request any "technically feasible" method of unbundling a DLC-loop. Any impediments to the competitive LECs' ability to unbundle sub-loops or collocate at remote terminals would have a detrimental effect on the deployment of advanced telecommunications capability.

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[81] *See supra* at III.A.

IV. RESALE OBLIGATIONS UNDER SECTION 251(c)(4)

1. The resale obligations of section 251(c)(4) should attach to all advanced services marketed by incumbent LECs generally to residential or business users or to Internet service providers, regardless of whether such services are classified as telephone exchange service or exchange access.

Transwire agrees with the Commission's *Order* and supports its conclusion that the dichotomy drawn between telecommunications services and exchange access services in the *Local Competition Order*[82] is inapt in the advanced services context.[83] Advanced services and the components that facilitate any advanced services offering, as ultimately deployed in the marketplace, must fall within the requirements of section 251(c)(4) of the Act[84] in order to ensure that the pro-competitive goals of the Act[85] are realized in the marketplace regardless of whether such services or components are classified as telephone exchange or exchange access services.

While, as a general matter, exchange access services are "predominantly offered to, and taken by, interexchange carriers ("IXCs"), not end users,"[86] nothing in incumbent LEC access

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[82] *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

[83] *NPRM* at ¶ 30.

[84] 47 U.S.C. § 251(c)(4) (1996). This provision imposes upon "incumbent local exchange carriers," as that term is defined in § 251(h), 47 U.S.C. § 251(h) (1996), the "duty . . . to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . .." 47 U.S.C. § 251(c)(4)(A) (1996).

[85] The Telecommunications Act of 1996 is entitled "[a]n Act to promote competition and reduce regulation on order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996).

[86] *Local Competition Order*, 11 FCC Rcd at 15935, ¶874.

tariffs limits such offerings to other telecommunications carriers.[87] Indeed, certain end users already avail themselves of exchange access services offered by the incumbent LEC.[88] However, Transwire recognizes, and the Commission made clear in its *Local Competition Order*,[89] the "essential nature" of exchange access services is that of an "input component to [an] IXC's own retail services."[90] Accordingly, in most circumstances, Transwire agrees that exchange access services fall outside the "core category of retail services" contemplated by section 251(c)(4).[91]

Nevertheless, as technology evolves, the lines are continually blurring and making formerly significant distinctions virtually meaningless. Continued rigid adherence to such distinctions has significant potential to stifle development, retard deployment, and impede competition in the advanced services context in particular. Therefore, Transwire encourages the Commission to adopt its tentative conclusion that advanced services marketed by incumbent LECs to residential or business users or to Internet service providers should be subject to the resale obligations contained in section 251(c)(4) without regard to their classification as telephone exchange service or exchange access.[92]

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[87] *Id.* at 15934-35, ¶873.

[88] *Id.* (describing end user purchase of "special access, Feature Group A, and certain Feature Group D elements for large private networks") (footnotes omitted).

[89] *Id.* at 15934 ¶874.

[90] *Id.*

[91] *NPRM* at ¶ 189.

[92] *Id.*

V. LIMITED INTERLATA RELIEF

1. The Commission should maintain LATA restrictions imposed on the regional Bell Operating Companies.

Transwire urges the Commission not to grant interLATA relief to allow BOCs to carry packet-switched traffic across current LATA boundaries for the purpose of providing end users with high-speed connections to nearby Internet network access points ("NAPs"). Such relief should not be considered a LATA "modification" as allowed by section 3(25) of the 1996 Act.[93] In order words, as a matter of both law and policy, the LATA modification process contemplated by section 3(25) must not be permitted to undercut the explicit statutory scheme allowing BOC entry into the interLATA market, including advanced telecommunications services.[94]

The Act is quite clear about the manner in which the BOCs may seek authority to enter the in-region interLATA services market.[95] In particular, section 271 sets out a detailed and specific procedure by which the Commission must evaluate a request for authority to enter either the interLATA telecommunications or information service markets and further obligates the Commission to monitor a BOC's continuing compliance with those competitive checklist requirements.[96] Thus, Congress has made its position quite clear: compliance with the competitive mandates of the 1996 Act and section 271 are necessary prerequisites for the

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[93] 47 U.S.C. § 153(25) (1996).

[94] *MCI v. AT&T*, 512 U.S. 218, 225 (1994) (use of the word "modify" in the Communications Act of 1934, as amended by 47 U.S.C. § 151 *et seq.*, means "to change moderately or in minor fashion").

[95] 47 U.S.C. § 271(c) (1996).

regional BOCs to enter the interLATA advanced telecommunications services market.[97] Congress further expressed this mandate by specifically foreclosing any Commission action that veers from the express terms of section 271: "LIMITATION ON COMMISSION—The Commission may not, by rule *or otherwise*, limit or extend the terms used in the competitive checklist . . . ."[98]

As a matter of law, the proposal flatly contradicts the 1996 Act. InterLATA relief that permits BOCs to function as a substitute for other advanced telecommunications service providers "effectively eviscerate[s] section 271 and circumvent[s] the pro-competitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act."[99] Section 271(a) of the Act expressly prohibits the BOCs from competing against interLATA information and telecommunications providers until such time as the BOC demonstrates compliance with the express terms of the statute.[100] Section 271 simply does not empower the Commission to upend Congress' deliberated statutory scheme by weighing it against a perceived need for BOC interLATA access to Internet NAPs. By clear and

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(footnote continued from previous page)

[96] 47 U.S.C. § 271(d) (1996).

[97] 47 U.S.C. § 271(c) (1996). While the Act allows the BOCs to provide "incidental interLATA services," as that term is defined in § 271(g), 47 U.S.C. §271(g) (1996), it also states that subsection (g) must be narrowly construed. 47 U.S.C. § 271(h) (1996).

[98] 47 U.S.C. § 271(d)(4) (1996) (emphasis added).

[99] *NPRM* at ¶82.

unequivocal terms, section 271 prevents the Commission from finding that a waiver, or modification, of LATA restrictions serves the public interest.

In addition to section 271, other statutory provisions reinforce that Congress meant for the Commission to strictly enforce, and not trade away, the interLATA restrictions. For example, section 10(d) of the Act forbids the Commission from any act of forbearance from section 271 "until it determines that those [section 271] *requirements have been fully implemented.*"[101] The general goals of Section 706 for reasonable and timely deployment of advanced telecommunications services do not obviate the Commission's primary role of implementing the will of Congress as expressed in the statute. Indeed, the Commission has explained that section 706 was "adopted contemporaneously with" the section 10 proscription and that "Congress was well aware of the explicit exclusions of our forbearance authority in section 10(d)."[102]

With respect to the Commission's concern about the BOCs' ability to provide advanced telecommunications services to school districts that cross LATA boundaries,[103] Congress considered and directly addressed the issue with an express and *limited* "incidental interLATA services" exception which allows a BOC to provide Internet services to "elementary and

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[100] 47 U.S.C. § 271(a) (1996), which provides: "Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."

[101] 47 U.S.C. § 160(d) (emphasis added).

[102] *NPRM* at ¶75.

secondary schools" across LATA boundaries.[104] The Commission also tentatively concludes that modification of LATA boundaries "for the purpose of facilitating high-speed access to the Internet" in rural areas "would further Congress' goal of ensuring that advanced services are deployed to all Americans."[105] While the Commission is likely correct in its determination that "facilitating high-speed access to the Internet" is consistent with Congress' express goals as set forth in section 706,[106] its conclusion that modifying LATA boundaries is an appropriate method of achieving those aims, at this point in the evolution of a robust but still nascent market, effectively puts the cart before the horse. Congress considered and expressly provided for limited interLATA exceptions to accommodate the provision of advanced telecommunications services by the BOCs.[107] For the Commission to expand the terms of these limited exceptions, by taking up *ad hoc* LATA "modification" requests, particularly so early in the development of the advanced telecommunications services market, would effectively override the express limitations of section 271.[108] The Commission is obligated to allow market forces to drive the deployment

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[103] *NPRM* at ¶192.

[104] 47 U.S.C. § 271(g)(2).

[105] *NPRM* at ¶194 (footnote omitted).

[106] 47 U.S.C. § 157 note (1996).

[107] 47 U.S.C. § 271(b)(3) and (g) (1996).

[108] 47 U.S.C. § 271(a) (1996). *See also* MCI v. AT&T, 512 U.S. at 225 (1994) (the term "modify" means to change moderately or in a minor fashion, not to rewrite the statutory plan).

of advanced telecommunications capability to all Americans; otherwise, the robust competitive marketplace contemplated by the Act will not be realized.

Moreover, Transwire notes that the LATA modifications permitted to date are qualitatively different than the proposals presently before the Commission, particularly that for BOC interLATA service to NAPs. In both the *LATA Association*[109] and the *Expanded Local Calling Area*[110] cases, the Commission's LATA modifications were aimed at improving local exchange service or meeting changes in state determinations of appropriate local calling areas and were consistent with the federal court decisions on LATA boundary waivers. Those modifications were not to compensate for some perceived limitations of the interLATA service industry. The interLATA-NAP proposal, however, is qualitatively different because it would afford the BOCs a method of entering the traditional market sphere of interLATA providers and of circumventing the stringent requirements of section 271.

Transwire also concludes that the InterLATA NAP proposal is highly unlikely to accomplish the goal of securing high-speed Internet-based services for end-users. The provision of Internet backbone services is a competitive business today. The entry of the BOCs into this market, with their monopoly control to the end-user, poses an enormous threat to competition. If, consistent with Congress' express desire, the Commission is committed to let market competition reign in the advanced telecommunications services market, then it must resist the

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[109] *See Guadeloupe Valley Telephone Cooperative Request for LATA Relief*, Memorandum Opinion and Order, 13 FCC Rcd 4560, 4563-64 (CCB 1998).

temptation to intervene based on BOC claims that somehow the competitive market has gone askew.[111]

In addition, requests to provide raw bandwidth using BOC interLATA lines reflect a misunderstanding of the common causes of less-than-expected application performance on the Internet. Since effective data transmission over the Internet depends on low packet loss rather than line capability, such issues will not be resolved through additional lines for raw bandwidth; rather, the causes of Internet congestion are more related to protocol dynamics. Internet performance problems are best addressed through Internet-specific engineering strategies that are not always emphasized or well-understood in the telephone community. For these reasons, BOC-provided solutions are unlikely to actually serve the underlying goal of "facilitating high-speed access."[112] As is most often the case in young markets, the best solution is more likely found among those who make the provision of advanced telecommunications capability their primary focus, not a secondary or tertiary one.

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[110] *See Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service*; Memorandum Opinion and Order, File No. NSD-LM-97-2, ¶¶14-17 (released July 15, 1998).

[111] Bell Atlantic-West Virginia's recent request for LATA modification also raises the possibility that the Commission's LATA modification process can be subject to manipulation. The record of that proceeding shows that Bell Atlantic was not interested in contacting other providers of interLATA lines that were, in fact, ready and able to provide the services. Rather, it underscores the BOC's desire to vertically integrate interLATA services with local access, by inventing a "backbone crisis." *Emergency Petition of Bell Atlantic—West Virginia for Authorization to End West Virginia's Bandwidth Crisis*, Emergency Request for Interim Relief, CC Docket No. 98-11 (filed July 22, 1998).

[112] *NPRM* at ¶194.

Accordingly, the Commission should heed the command of Congress and stand fast against *ad hoc* modifications to LATA boundaries. Let the invisible hand of market economics work its magic[113] and shape the advanced telecommunications services market. As demand requires, competition will drive entry into the interLATA services market, and Congress' dual dream of the deployment of advanced telecommunications capability to all Americans in a robust competitive market unencumbered by regulation will be realized.

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[113] The Commission would be wise to abide Adam Smith's teaching that individual market decisions operate in the collective interest of market players as if guided by an "invisible hand." A. Smith, The Wealth of Nations *passim* (1776).

CONCLUSION

The deployment of advanced telecommunications capability to all Americans, as is the Commission's charge, is contingent on the ability of competitive and innovative providers of advanced telecommunications services to enter the market unburdened by unnecessary regulation and assured of ready access to those elements of the existing telecommunications infrastructure integral to the provision of advanced services. Accordingly, the Commission must in this rulemaking undertake only those actions that encourage robust competition and technological advancement. The Commission must tame the advantages of the monopolies that have defined the telecommunications industry throughout the majority of this century and nurture the next generation of competing providers to ensure that all Americans realize to the fullest extent possible the wonders of the telecommunications revolution already underway.

Respectively submitted,

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Dated: September 25, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Comments of Transwire Communications, Inc. was sent via hand-delivery to the individuals on the attached service list, this 25th day of September, 1998.

Renee Roland Crittendon

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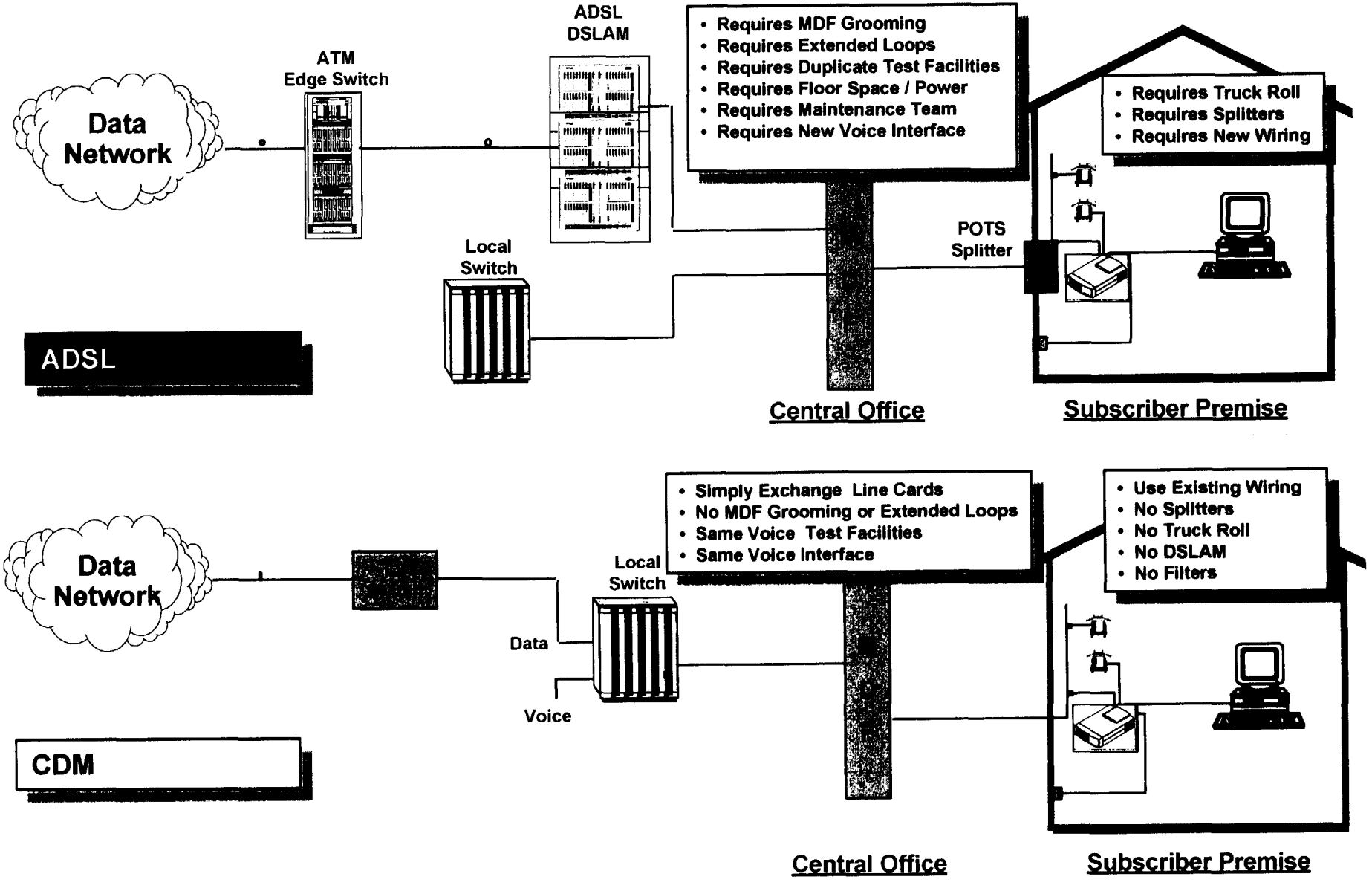

ADSL Provisioning Options

Integrated Line Card vs. Digital Subscriber Line Access Multiplexer

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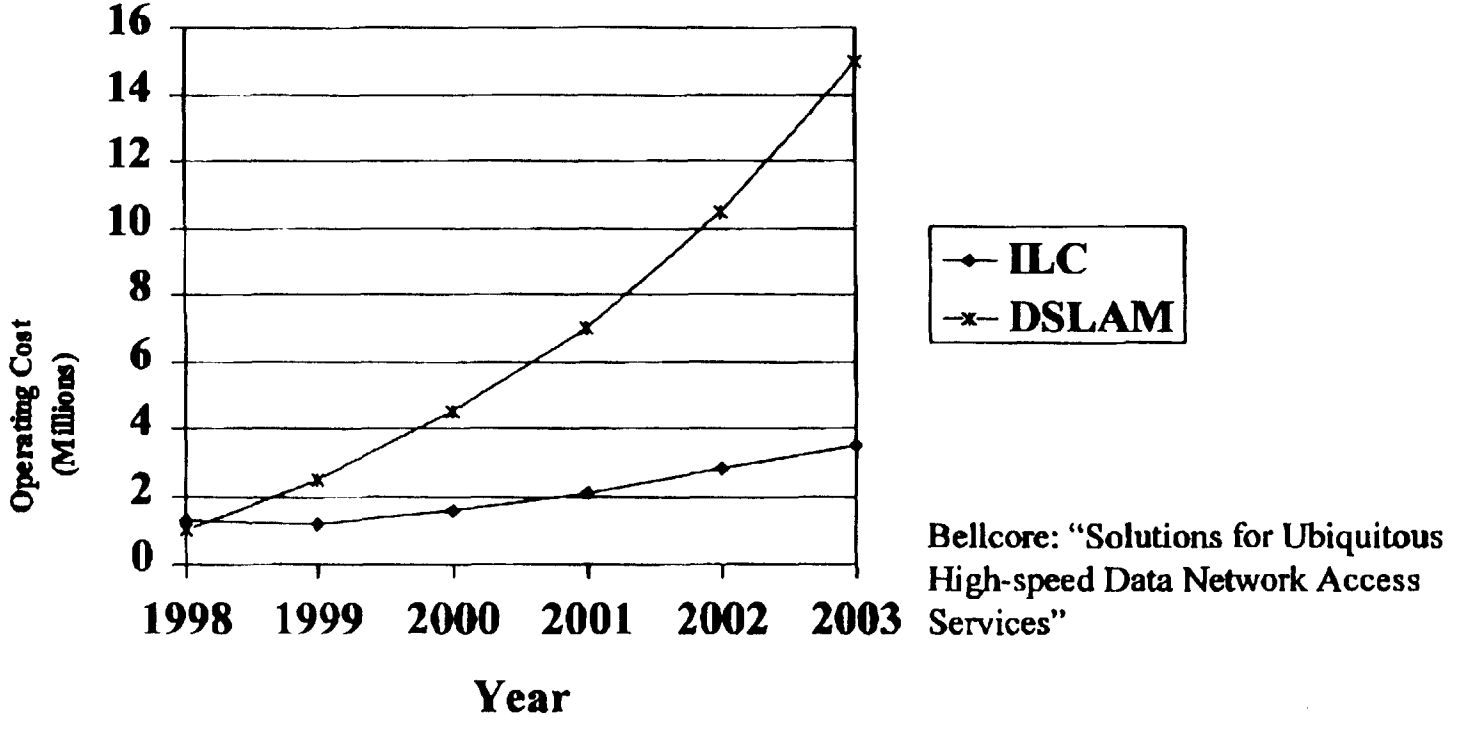
Using anticipated growth and churn rates, Bellcore estimated provisioning requirements for copper plant, DSLAM and transport facilities and identified a 60% annual operations cost savings for an integrated line card approach - like the Nortel 1MM - versus a DSLAM deployment model.



Bellcore: "Solutions for Ubiquitous High-speed Data Network Access Services"